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No. 07-827

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IN THE

Supreme Court of the United States

DENNIS HASTY, former Warden,

Petitioner,

v.

JAVAID IQBAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether plaintiffs in *Bivens* actions should be required to anticipate the affirmative defense of qualified immunity by meeting a heightened pleading requirement not required by the Federal Rules, contrary to this Court's longstanding precedent regarding both qualified immunity and liberal pleading standards.

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IN THE

Supreme Court of the United States

No. 07-827

DENNIS HASTY,
Petitioner,
v.
JAVAID IQBAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

Petitioner asks the Court to grant certiorari to decide whether a heightened pleading standard applies to complaints filed against supervisory officials in *Bivens*[1] lawsuits who invoke the qualified immunity defense.[2] Because this Court has rejected judicially-imposed heightened pleading standards, the Second Circuit correctly refused petitioner's invitation to apply a heightened pleading standard in this case. App. 162a-163a. Every appellate court that has considered the implication of the Supreme Court's recent decisions in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), has come

[1] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[2] Although petitioner does not explicitly use the term "heightened pleading standard" in his statement of the question presented, his argument for a special pleading rule for *Bivens* defendants who assert a qualified immunity defense is subject to only one reasonable interpretation: requiring something more than simple notice pleading. Alternatively, to the extent that petitioner is asking this to Court review the Second Circuit's application of Rule 8's pleading requirements, the petition presents a fact-bound splitless question of error correction. *See infra* 22-26.

to the same conclusion. Petitioner does not even claim to identify a split of authority among the circuit courts regarding the question presented, and ultimately asks this Court to engage in fact-intensive error correction of the Second Circuit's application of Fed. R. Civ. P. 8's liberal pleading standard. Because this is an insufficient reason to grant the petition, because the Second Circuit's decision is correct, and because numerous factors make the instant case a poor vehicle for reaching the issues sought to be presented by petitioner, respondent respectfully requests that the petition be denied.

STATEMENT

1. Beginning in January 2002, respondent Javaid Iqbal was held for more than 150 days in a super maximum security unit on the ninth floor of Brooklyn, New York's Metropolitan Detention Center ("MDC") that was known as the "ADMAX SHU"—short for Administrative Maximum Special Housing Unit. Pursuant to policies adopted by petitioner and other officials after September 11, 2001, Mr. Iqbal was held in the ADMAX SHU without ever receiving a hearing or being told of the basis for his confinement there.[3] App. 17a, 20a (Compl. ¶¶ 81, 97.) Throughout this entire time, respondent was confined for twenty-three hours a day in an isolation cell. *Id.* 14a (Compl. ¶ 63.) He was subjected to strip and body-cavity searches each morning; additionally invasive body cavity searches were conducted both before, and again after, the rare occasions when he was permitted to leave his cell for court appearances, medical care, or non-contact visits with his attorney. *Id.* 14a, 28a-30a (Comp. ¶¶ 63, 137-48).) Correction officers beat him, humiliated him, taunted him with racial slurs, deliberately subjected him to uncomfortably hot and cold temperatures for

[3] Petitioner suggests that the actions taken against respondent were somehow an "extension" of the Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001). Pet. 3-4. This claim is not supported by anything in the record.

extended periods of time, prevented him from praying, confiscated his Koran, restrained him in shackles, chains, and manacles whenever he left his cell, and interfered with his communications with counsel. *Id.* 13a, 17a-19a, 23a-25a, 31a-34a (Compl. ¶¶ 60, 84, 87, 89, 113, 116-17, 120, 122, 153-54, 158, 168, 171.) The only reason respondent was confined on the ADMAX SHU was because of the discriminatory policies of petitioner and other defendants directed at Muslim men who were detained after September 11. *Id.* 20a (Compl. ¶ 96.)

Like all of the Muslim men of Arab or South Asian descent residing in the United States and swept up by the Government's investigation after September 11, Mr. Iqbal was eventually "cleared" of any involvement in terrorism and deported. Along with Ehab Elmaghraby,[4] Mr. Iqbal subsequently brought this lawsuit, seeking compensation for the central role that petitioner and other federal officials played in setting the terms, conditions, and extent of his confinement. By his First Amended Complaint dated September 30, 2004, Mr. Iqbal brought claims under *Bivens*, *supra*, for violations of his First, Fourth, Fifth, Sixth, and Eighth Amendment rights, as well as various statutory claims.

2. The complaint names individual defendants who crafted, directed, and implemented practices and procedures regarding the conditions and duration under which Mr. Iqbal was confined in the ADMAX SHU. Among these officers was petitioner, Warden Dennis Hasty, under whose immediate direction the ADMAX SHU was established shortly after September 11th. App. 12a-13a (Compl. ¶¶ 53–58.) The complaint also named individual correction officers and supervisors who had daily interactions with respondent, and several higher-ranking Department of Justice officials who together coordinated the investigation and detention initia-

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[4] On behalf of all defendants, the United States settled claims with Mr. Elmaghraby for $300,000 prior to the Second Circuit's decision.

tives under which Mr. Iqbal was apprehended and confined.[5] Despite petitioner's claim to the contrary, *see* Pet. 7, the complaint contains much more than mere "boilerplate" allegations regarding Warden Hasty.

Delegated to petitioner, for instance, was the critical task of establishing and staffing the ADMAX SHU. App. 13a (Compl. ¶¶ 57–58). Petitioner selected correctional officers and lieutenants he knew would impose, condone, and tolerate the punitive treatment of the September 11 detainees committed to their custody and care. *Id.* 25a, 30a, 32a, 34a (Compl. ¶¶ 125, 150, 161, 175.) Moreover, as a matter of policy, petitioner confined respondent in the ADMAX SHU—where he was kept in isolation, subjected to repeated strip and body cavity searches, prohibited from leaving his cell for more than one hour each day, housed in a cell with lights on almost 24 hours per day, and rarely permitted to exercise—for no legitimate penological purpose, and solely because of unlawful discrimination on the basis of race, religion, and national origin. *Id.* 17a-20a (Compl. ¶¶ 81-96.) It is specifically alleged that petitioner is one of the policy makers personally responsible for imposing these conditions on respondent. *Id.* 20a (Compl. ¶¶ 96–97.)[6]

With respect to petitioner's supervisory liability, the complaint makes numerous relevant allegations. Petitioner failed to implement policies to curtail the unconstitutional beatings of Mr. Iqbal and the extreme strip and body cavity

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[5] A number of these individuals have filed separate petitions for writs of certiorari. Docket Nos. 07-1015, 07-1150.

[6] While respondent need not rely on more than these allegations, it is noteworthy that relevant regulations issued by the Bureau of Prisons amply support the contention that petitioner, while Warden, was personally responsible for determining whether, for how long, and under what circumstances Mr. Iqbal was confined in the ADMAX SHU. *See* 28 C.F.R. §§ 524.10–524.12 (warden responsible for initial classification upon admission); *id.* § 541.22(b) (warden responsible for placing detainees in administrative segregation); *id.* § 541.22(c) (warden responsible for reviewing placement in administrative segregation); *id.* § 541.22(d) (warden sets conditions of administrative segregation).

searches experienced by respondent, failed to respond to complaints regarding interference with religious practice, and approved as a matter of policy the substantial restrictions on respondent's right to communicate with his criminal defense counsel. *Id.* 25a, 29a-30a, 32a, 34a-35a (Compl. ¶¶ 124-25, 148-50, 159-61, 173-75.) He was aware of and approved each of the unconstitutional policies and practices alleged in the complaint, yet took no steps to curb this unlawful conduct. *Id.*

3. Prior to engaging in discovery, in October, 2004, several defendants and petitioner filed separately briefed motions to dismiss respondent's complaint.[7] Among other arguments, the officials asserted that the complaint should be dismissed under Rule 12(b)(6) on ground of qualified immunity. On September 27, 2005, Judge John Gleeson, E.D.N.Y., disposed of each official's motion in an omnibus memorandum and order. *Id.* 63a-145a. While the court dismissed some of respondent's statutory claims, it permitted each of his *Bivens* claims to proceed against one or more of the moving officials. The court noted that "the post-September 11 context provides support for plaintiffs' assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined without due process." *Id.* 110a. Moreover, "some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved." *Id.* 112a. Reasoning that Mr. Iqbal "should not be penalized for failing to assert more facts" given that the extent of defendants' respective "involvement is peculiarly within their own knowledge," *id.*, the court concluded that the facts alleged in respondent's complaint were sufficient. Eight defendants then noticed appeals to the Second Circuit Court of Appeals.

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[7] Although discovery has been stayed against the defendants who are pursuing their motions to dismiss, discovery has continued against the remaining defendants.

4. A panel of the Second Circuit affirmed the district court's opinion in large part, holding that petitioner was entitled to proceed to discovery on the vast majority of his claims. *Id.* 146a-215a. Several aspects of the Second Circuit's opinion are pertinent to the petition. First, the Second Circuit interpreted this Court's decisions in *Leatherman*[8] and *Swierkiewicz* to mean what they said: "a court cannot impose a heightened pleading standard in *Bivens* (or other civil rights) actions against individual officers" absent authorization from a statute or the Federal Rules. App. 162a-163a. Second, it interpreted this Court's decision in *Bell Atlantic* to require a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* 170a (emphasis in original). Third, to the extent that a defendant believes that *some* elements of a plaintiff's claim are based on "conclusory" allegations, the Second Circuit pointed to Fed. R. Civ. P. 12(e), consistent with this Court's suggestion in *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998).[9] App. 172a. Finally, the circuit court provided explicit guidance to the district court to oversee discovery with an eye towards preserving the substance of the qualified immunity defense. App. 172a-173a (suggesting that district court examine responses to interrogatories and requests to admit prior to permitting depositions, defer discovery of high level officials until other defendants have testified, and permit motions for summary judgment on qualified immunity grounds after "carefully targeted discovery" aimed at discovering the personal knowledge and involvement of individual defendants). Petitioner has to date refused

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[8] *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

[9] The Second Circuit did not find that any of the allegations made against petitioner were "conclusory." Indeed, the Second Circuit found that the allegations made against petitioner were sufficient on their own to establish plaintiff's entitlement to discovery. App. 188a, 194a, 195a-196a, 202a.

to avail himself of the opportunities presented by the Federal Rules, and amplified by the Second Circuit, to obtain further specification of the basis for the claims against him.

5. The longstanding rule, embodied by the Second Circuit's decision below, is that complaints filed in federal court need only meet the standards set forth in Rule 8, unless a statute calls for a higher pleading standard, or the plaintiff is alleging facts which fall into the particularized requirements of Fed. R. Civ. P. 9. *Leatherman*, 507 U.S. at 168-169; *Swierkiewicz*, 534 U.S. at 514-515; *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (per curiam). As this Court has emphasized numerous times, "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Hill v. McDonough*, 547 U.S. 573, 582 (2006). In the absence of a specific heightened pleading requirement, "ordinary pleading rules are not meant to impose a great burden upon a plaintiff." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The Rule 8 standard is satisfied if a complaint gives "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 512 (internal quotation marks omitted). "Fair notice" is that which will enable the defendant to answer and prepare for trial. 5 Wright & Miller, Federal Practice & Proc. § 1215 (pleadings need to be detailed enough "to enable the defendant to respond"). In a garden variety negligence action, for example, it is sufficient to state that on a given date and a given place, "defendant negligently drove a motor vehicle against plaintiff." *Swierkiewicz*, 534 U.S. at 513 n.4 (*quoting* Form 9 of Federal Rules of Civil Procedure Forms). In the more closely analogous Title VII context, it is sufficient to allege that an adverse employment action was taken "on account of" prohibited factors. *Swierkiewicz*, 534 U.S. at 514. Thus, under Rule 8, a complaint need not identify the exact nature or mechanism of the defendant's misfeasance to state a claim.

6. A unanimous Supreme Court has consistently emphasized Rule 8's liberality while advising against misguided attempts to carve out particular causes of action for heightened pleading requirements. In *Leatherman* the Court rejected a Fifth Circuit rule requiring that complaints brought under 42 U.S.C. § 1983 ("Section 1983") against municipal corporations "state with factual detail and particularity the basis for the claim." 507 U.S. at 167. The Court declared this standard "impossible to square . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168.

7. A decade after *Leatherman*, the Court again unanimously struck down a heightened pleading standard originating in well-settled case law, this time as announced by the Second Circuit. [10] The Court cautioned that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits. *Id.* at 512-513. In this connection the Court reiterated its previous admonition that a "requirement of greater specificity for particular claims," whatever the "practical merits," may be obtained only "by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz*, 534 U.S. at 514-515 (internal quotation marks omitted); *see also Crawford-El*, 523 U.S. at 595 ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").

8. Relying on *dicta* in *Crawford-El*, petitioner persists in arguing that every allegation against him must be pleaded via "specific, nonconclusory factual allegations." Pet. 13, 16. The Second Circuit correctly recognized *Swierkiewicz* to foreclose such an interpretation of the earlier *Crawford-El*

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[10] Specifically, *Swierkiewicz* reversed the Second Circuit's holding that a complaint alleging employment discrimination under Title VII of the Civil Rights Act of 1964 must set forth facts sufficient to establish a *prima facie* case as defined by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and progeny.

opinion. App. 162a. Indeed, *Crawford-El* plainly addressed the "burden of proof" by which a Section 1983 defendant's allegedly discriminatory intent must be shown, *Crawford-El*, 523 U.S. at 594, thus concerning itself not with any pleading requirement, but with the same type of question the Court expressly recognized in *Swierkiewicz* to be a wholly distinct matter. *See Swierkiewicz*, 534 U.S. at 510 (distinguishing between a minimal pleading standard and the proof necessary to establish a claim at trial). Even before *Swierkiewicz*, nearly every Court of Appeals to consider the matter had concluded that the Court's reasoning in *Crawford-El* required the rejection of judge-imposed heightened pleading standards. *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) (collecting cases and noting that First Circuit was exception).

9. And after *Swierkiewicz*, no circuit court that has actually considered the decision has concluded that a heightened pleading standard is appropriate. *See Doe v. Cassel*, 403 F.3d 986, 989 & n.3 (8th Cir. 2005); *Alston v. Parker*, 363 F.3d 229, 233 (3d Cir. 2004); *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 65, 66-67 (1st Cir. 2004); *Galbraith*, 307 F.3d at 1124-1125; *Goad v. Mitchell*, 297 F.3d 497, 501-505 (6th Cir. 2002);[11] *Thomson v. Washington*, 362 F.3d 969, 970-971 (7th Cir. 2004) (Posner, J.); *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir.2001); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001); *see also Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004) (noting that Fifth Circuit's heightened pleading standard for qualified immunity cases had been overruled in 1995).

10. This Court's decision in *Bell Atlantic* does not change this analysis. First, *Bell Atlantic* reaffirmed *Swierkiewicz*, and with it the rejection of any heightened pleading standards imposed by judicial fiat. 127 S. Ct. at

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[11] Although petitioner fails to acknowledge it, *Goad* overruled the Sixth Circuit's decision in *Rippy v. Hattaway*, 270 F.3d 416 (6th Cir.2001), one of the decisions cited by petitioner in support of a heightened pleading standard. Pet. 8 n.7

1973-1974 & n.14. Second, rather than require detailed fact pleading, the Court simply held that the facts alleged, taken as true, have to plausibly suggest relief. *Id.* at 1964 (not requiring "detailed factual allegations"); *id.* at 1973 n.14. The court contrasted this with what it admitted was one extreme reading of some language from *Conley*, namely that a complaint could not be dismissed if a court could imagine any set of facts, whether alleged in the complaint or not, that could support the claims for relief. *Id.* at 1968-1969. Instead of leaving such matters to a court's imagination, after *Bell Atlantic* claims must be supported by facts alleged in the complaint, even if they may be proven by other facts developed through discovery. *Id.* at 1969. And where a complaint alleges facts that are consistent with both legal and illegal conduct, as did the complaint in *Bell Atlantic*, Rule 8 simply requires some additional allegation that pushes the complaint into the realm of "plausibility." *Id.* at 1972-1973; *Robbins v. Oklahoma*, -- F.3d --, 2008 WL 747132, *3 (10th Cir. 2008) (interpreting *Bell Atlantic* to have particular force where complaints allege facts that are consistent with both legal and illegal conduct). Thus, *Bell Atlantic* disclaimed any intention to radically alter the Rule 8 pleading standard; rather, it announced the retirement of a phrase from *Conley* that few lower courts had taken literally and that "is best forgotten as an incomplete, negative gloss on an accepted pleading standard." 127 S. Ct. at 1969.

11. That *Bell Atlantic* worked no significant change to Rule 8 pleading standards is evidenced by the Court's per curiam disposition of a prisoner's Section 1983 complaint in *Erickson*, *supra*. In *Erickson*, the lower court had dismissed a prisoner's Section 1983 claim for deliberate indifference to serious medical needs because the prisoner had failed to allege that he suffered any particular harm as a result of a denial of medical treatment. 127 S. Ct. at 2199. The Court reversed this disposition, finding that an allegation that the denial of care was endangering the prisoner's life was sufficient, without more, to state a claim. *Id.* at 2200. In so do-

ing, the Court reemphasized that such a contention, albeit lacking specifics, was not "too conclusory" to provide fair notice of the substance of the claim, that "[s]pecific facts are not necessary," and that all factual allegations in the complaint must be taken as true at the motion to dismiss stage. *Id.* (citing *Bell Atlantic* and *Swierkiewicz*). It goes without saying that, although a qualified immunity defense was available to the defendant in *Erickson*, the Court did not apply a different pleading standard in evaluating the complaint.

REASONS FOR DENYING THE PETITION

In seeking certiorari, petitioner argues, first, that there is "confusion" in the lower courts regarding the correct legal standard for reviewing *Bivens* complaints against which the defense of qualified immunity is raised and, second, that the Second Circuit's opinion conflicts with this Court's precedents concerning pleading requirements. Neither contention has any merit. There is no "confusion" in the lower courts regarding the appropriate standard of pleading in *Bivens* action– indeed, petitioner does not identify a plausible circuit split on this issue. No court has interpreted this Court's decision in *Bell Atlantic* to impose a heightened pleading standard in civil rights cases. *Infra* 18-21 & nn.17-22. Every circuit court has agreed that there is no conflict between *Bell Atlantic*'s holding that a plaintiff's entitlement to relief must be plausible based on the facts alleged in the complaint, and *Swierkiewicz*'s holding that heightened pleading standards may not be imposed by the judiciary absent some direction from the Federal Rules or through legislation. *Infra* 20. Contrary to petitioner's contention, the Courts of Appeals, in the short time since *Bell Atlantic* has been decided, are in remarkable unison regarding the scope and meaning of the decision.

Similarly, petitioner's claim that the Second Circuit misapplied relevant Supreme Court precedent is not a certworthy issue and finds no support in the decision below: plaintiff's

complaint contains well-pleaded factual allegations concerning petitioner's conduct. And consistent with this Court's admonition in *Crawford-El*, the Second Circuit suggested numerous limitations that the district court may impose on discovery, rather than impose a heightened pleading standard in this case. App. 172a-173a; *Crawford-El*, 523 U.S. at 597-598. Simply put, the Second Circuit carefully followed this Court's established precedent.

Even if the Court determined that the issues raised here warranted review in the abstract, this interlocutory appeal in particular is a poor vehicle to address the question presented. There are substantial questions regarding the Court's jurisdiction to reach the issue sought to be presented by petitioner. Moreover, even if the Court were to determine that the complaint's allegations provide insufficient notice to petitioner under the *Bell Atlantic* standard, ample facts have been uncovered through ongoing discovery to allow for a detailed amendment to the pleadings, as petitioner is well aware. Therefore, in this particular case, granting cert would only delay the case further to no apparent purpose.

I. THERE IS NO "CONFUSION" IN THE LOWER COURTS REGARDING THE QUESTION PRESENTED

The question sought to be presented by the petition is "Whether a supervisory official sued as an individual defendant in a *Bivens* action is entitled to qualified immunity when the plaintiff pleads only generalized and conclusory allegations in his complaint and asserts no specific facts as to that supervisory official." Pet (i). Nowhere does the petition, however, identify a split in the circuit courts regarding this question. Indeed, even this Court has only said that allegations in complaints may not be "too conclusory" to meet Rule 8's requirements. *Erickson*, 127 S. Ct. at 2200. This Court, while never specifically defining the meaning of "conclusory," has at least made it clear that the standard of nonconclusory allegations is easily satisfied. *Swierkiewicz*, 534 U.S.

at 513 n.4 (negligence complaint need only allege that a driver "negligently caused injury" at a particular time and place). In the Title VII context, analogous to the equal protection claims raised here, the Court has approved a complaint which does not even allege a *prima facie* case of discrimination, but simply states that an adverse employment action was taken "on account of" an employee's membership in a protected class. *Swierkiewicz*, 534 U.S. at 514. This Court has thus emphasized that a requirement of "factual detail and particularity" is inconsistent with Rule 8's requirements. *Leatherman*, 507 U.S. at 167.

Instead of identifying a split of authority as to the actual question presented—pleading standards in *Bivens* actions—petitioner suggests three possible arguments for the "confusion" regarding the applicable pleading standard in civil rights cases generally: first, according to petitioner, two district court cases and one unpublished Sixth Circuit decision suggest that *Swierkiewicz* did not completely invalidate heightened pleading standards in civil rights cases, Pet. 17; second, the Eleventh Circuit has applied a heightened pleading standard in civil rights cases in which qualified immunity is available as a defense, *id.*; and third, petitioner suggests that the Court's decision in *Crawford-El* is in tension with Rule 8's liberal pleading standard, *id.* at 13. Petitioner also makes the untenable suggestion that *Erickson* is somehow a source of "confusion," Pet. 18, but as established above (pp. 10-11, *supra*), *Erickson* repudiated any heightened pleading standard in civil rights cases.

The two district court cases and the unpublished Sixth Circuit case are cited by petitioner for the proposition that courts continued to apply "heightened pleading" language from *Crawford-El* after *Swierkiewicz*, suggesting that "the bare notice pleading standard in *Swierkiewicz* was not necessarily definitive for these types of cases." Pet. 16-17 (*citing Ruffin v. Nicely*, 183 Fed. Appx. 505, 510 n.1 (6th Cir. 2006); *Powers-Bunce v. District of Columbia*, 479 F. Supp. 2d 146, 158 (D.D.C. 2007); *Scott v. Garcia*, 370 F. Supp. 2d 1056,

1072 (S.D. Cal 2005). As for the district court cases, the existence of discordant district court authority concerning pleading standards is not a sufficient reason to grant certiorari. In any event, the district court cases cannot bear the weight petitioner places upon them. *Scott* is a decision on summary judgment; therefore, its citation to *Crawford-El* for the proposition that facts must be "specific" and "nonconclusory," 370 F. Supp. 2d at 1071-1072, has no application in the motion to dismiss context. And *Powers-Bunce*, while involving motions to dismiss by multiple defendants, is entirely consistent with the Second Circuit's decision in the instant case: although the plaintiff argued to the court that there had been a beating which led to her son's death, the complaint did not even allege that a beating occurred, nor did it claim that the named defendants had anything to do with the beating. 479 F. Supp. 2d at 154-155. Instead of dismissing the complaint, however, the court reconciled the competing interests of Rule 8 and qualified immunity by treating the motions to dismiss as motions for a more definite statement under Rule 12(e), and provided the plaintiff the opportunity to replead because civil rights plaintiffs are typically at an informational disadvantage. *Id.* at 158-159. The option of using Rule 12(e) to balance qualified immunity against Rule 8's liberal pleading standard was specifically adverted to by the *Crawford-El* Court, and the Second Circuit referred to it as an option for petitioner, App. 172a, yet he has never taken the opportunity to seek such a remedy.[12]

Ruffin, the unpublished Sixth Circuit case cited by petitioner, offers no support for the position advanced by peti-

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[12] This is likely because the several months of discovery that has been ongoing has revealed overwhelming evidence of petitioner's knowledge of and involvement in the treatment of respondent and other ADMAX SHU detainees. Petitioner no doubt is aware that were he to seek relief under Rule 12(e), respondent would be able to provide specific factual support for most of his allegations. This is not to say that discovery regarding petitioner's involvement is close to complete, in large part because petitioner was granted a stay of any discovery directed against him during the pendency of the instant petition.

tioner here. First, the court declined to dismiss a civil rights complaint under a heightened pleading standard. 183 Fed. Appx. at 510 n.1 (internal quotation marks omitted). Indeed, in a portion of the opinion not cited by petitioner, the Sixth Circuit extended *Swierkiewicz*'s holding to all theories of relief, not just Title VII claims. 183 Fed. Appx. at 513. Moreover, post-*Ruffin* Sixth Circuit cases have expressed no disagreement with *Iqbal*, *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 540-542 (6th Cir. 2007) (noting that almost all district courts in the circuit were in conformity with *Iqbal*), and have read *Bell Atlantic* to require something more that "labels and conclusions" but not "detailed" facts, *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 501 F.3d 493, 502 (6th Cir. 2007) (internal quotation marks omitted). Importantly, prior to *Bell Atlantic* the Sixth Circuit had interpreted *Swierkiewicz* to require the abandonment of any heightened pleading standard in civil rights cases in which qualified immunity is invoked. *Goad*, 297 F.3d at 501-505. And after *Bell Atlantic*, the Sixth Circuit has concluded that *Swierkiewicz*'s force remains unchanged, especially in light of *Erickson*. *Lindsay v. Yates*, 498 F.3d 434, 439-440 & n.6 (6th Cir. 2007). Therefore, there is no basis for questioning the continuing vitality of the Sixth Circuit's holding that *Swierkiewicz* leaves no room for a heightened pleading standard in cases in which qualified immunity is raised.

Petitioner also makes reference to an Eleventh Circuit case, *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003), arguing that it shows that even after *Swierkiewicz*, at least one circuit court applied a heightened pleading standard in *Bivens* actions.[13] Pet. 17. To the extent *Gonzalez* suggests tension between the Eleventh Circuit and its sister courts, however, it has not been meaningfully developed for several reasons. *Gonzalez* was briefed and argued prior to this Court's decision in *Swierkiewicz*, and the court did not cite

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[13] Despite petitioner's claim that the issue presented is one of national importance, this is the only circuit court case that petitioner cites that involves a *Bivens* defendant.

Swierkiewicz, let alone address whether it could be squared with a heightened pleading standard in civil rights cases. Since *Gonzalez* was decided, the Eleventh Circuit has neither cited *Swierkiewicz*, nor discussed its impact in cases in which a "heightened pleading" standard was applied. *Epps v. Watson*, 492 F.3d 1240 (11th Cir. 2007); *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834 (11th Cir. 2004); *Osburn v. Cox*, 369 F.3d 1283 (11th Cir. 2004); *Omar ex rel. Cannon v. Lindsey*, 334 F.3d 1246 (11th Cir. 2003); *Dalrymple v. Reno*, 334 F.3d 991 (11th Cir. 2003); *Cottone v. Jenne*, 326 F.3d 1352, 1362 n.7 (11th Cir. 2003). By contrast, every circuit court of appeals to discuss *Swierkiewicz* in the context of pleading standards has concluded that a heightened pleading standard is inappropriate. *Supra* 9; *infra* 20-21. Thus, to the extent the Eleventh Circuit has applied a heightened pleading standard in civil rights cases, it has not yet been forced to address the meaning of *Swierkiewicz* and, more importantly, *Erickson*, as they relate to a heightened pleading requirement.[14] There is thus no support for petitioner's contention that the Eleventh Circuit has, contrary to other circuits, read *Swierkiewicz* to permit application of a heightened pleading standard in cases in which qualified immunity has been raised; the Eleventh Circuit has not given *any* interpretation to *Swierkiewicz* or *Erickson* in the context of heightened pleading standards.

Nor, contrary to petitioner's contention, does the Court's decision in *Crawford-El* offer any support for the question presented here. In *Crawford-El*, the Court addressed and forcefully rejected a judicially-created heightened burden of proof that had been imposed on civil rights plaintiffs in which the motive of the defendant was an element of the cause of action. 523 U.S. at 592-594. The Court's analysis only buttresses the widespread rejection of heightened pleading standards. The Court emphasized that it had consistently "declined similar invitations to revise established rules that

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[14] The Eleventh Circuit has yet to issue an opinion, published or unpublished, which cites or discusses *Erickson*.

are separate from the qualified immunity defense," including invitations to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense." *Id.* at 595. And in a portion of the case that petitioner only selectively quotes from, the *Crawford-El* Court stated in *dicta*:

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or a third party's answer under Federal Rules of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.

Id. at 597-598 (internal quotation marks omitted)

Petitioner only quotes the portion of the opinion which refers to the district court's power to require the plaintiff to put forward "specific, nonconclusory factual allegations." Pet 13, 15-16. But petitioner neglects to discuss the context in which this comment was made; that is, where a district court either exercises its discretion to order a reply to a defendant's answer, or to grant a defendant's motion for a more

definite statement under Rule 12(e). Here, defendant neither answered the complaint nor moved for a more definite statement. Therefore, the district court had no authority under *Crawford-El* to insist on more "specific" factual allegations. Petitioner's contrary contention, implying that plaintiff should have anticipated petitioner's invocation of the *affirmative defense* of qualified immunity at the time of filing, is contrary to *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), which *Crawford-El* cited approvingly for the proposition that the Court will not alter the pleading requirements of the Federal Rules to require a plaintiff to anticipate an immunity defense. 523 U.S. at 595. The Court's unanimous decision in a prison conditions case, *Jones v. Bock*, 127 S. Ct. 910, 921 (2007), recently confirmed this general rule. *Jones* held that because failure to exhaust administrative remedies is an affirmative defense, prisoners need not anticipate the defense and plead their compliance with exhaustion requirements in order to meet Rule 8's pleading requirements.[15] *Id.* Thus, petitioner's argument that qualified immunity triggers a heightened pleading requirement is directly contradicted by the Court's decision in *Crawford-El* and by the Court's general rule regarding affirmative defenses.[16]

Finally, petitioner claims that *Bell Atlantic* has created a "scramble" among lower courts trying to interpret what it means for pleading requirements. Pet. 17. Read closely, however, even petitioner acknowledges that the circuit courts

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[15] Of course, there were substantial policy arguments in favor of requiring affirmative pleading of exhaustion by prisoner plaintiffs. *Jones*, 127 S. Ct. at 920-921. But the Court confirmed the general rule that specific pleading requirements are not to be imposed through "case-by-case determinations of the federal courts." *Id.* at 919-920.

[16] If civil rights plaintiffs were required to anticipate the availability of a qualified immunity defense in civil rights cases, there would be some difficulty in even predicting whether a particular defendant will be entitled to invoke the defense as a general matter. *Richardson v. McKnight*, 521 U.S. 399 (1997) (applying case-by-case analysis to determine whether private entities acting "under color of" state law are entitled to qualified immunity in Section 1983 suits).

agree that *Bell Atlantic* reinforces *Swierkiewicz*, while only district courts have suggested that *Bell Atlantic* has "significantly change[d]" Rule 8's pleading requirement. Pet. 17-18 & n.10. Ultimately, the only circuit court authority that petitioner can cite for the proposition that lower courts are confused about *Bell Atlantic* is Judge Cabranes' concurring opinion in *Iqbal*. Pet. 19. But Judge Cabranes himself opined that the decision below is fully consistent with this Court's precedents. App. 213a. In fact, there is little if any confusion among the circuit courts as to *Bell Atlantic*'s meaning and scope. The Second Circuit maintains its adherence to *Iqbal*, in a variety of contexts. *E.g.*, *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 n.2 (2d Cir. 2007) (reaffirming *Iqbal*'s holding that *Bell Atlantic* applies beyond antitrust context). And those circuits that have discussed *Iqbal* have done so with approval. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (citing *Iqbal* without disagreement); *Weisbarth*, 499 F.3d at 540-542 (noting that almost all district courts in the circuit had agreed with *Iqbal*'s "close[] analy[sis]" of *Bell Atlantic*);[17] *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 n.2 (10th Cir. 2007).[18] Even the Eleventh Circuit has interpreted *Bell Atlantic*, in a civil rights

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[17] That there may be one district court in the Sixth Circuit which has limited *Bell Atlantic* to the antitrust context is of no moment, in terms of showing a circuit split.

[18] Those courts that have not explicitly discussed *Iqbal* have come to the same conclusion as the Second Circuit that *Bell Atlantic* applies to a wide range of subject matters. *Giarratano v. Johnson*, -- F.3d --, 2008 WL 771503, *3-5 (4th Cir. 2008) (Section 1983 claim); *Kozikowski v. Commissioner of Internal Revenue*, No 07-1281, 2007 WL 3377146, *1 (8th Cir. 2007) (per curiam) (unpub. op.) (tax court action); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (question of personal jurisdiction); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (challenge to arbitration decision); *Ellibee v. Fox*, 244 Fed. Appx. 839, 843, 2007 WL 1776347 (10th Cir. 2007) (per curiam) (unpub. op.) (Section 1983 claim).

case, in accord with *Iqbal*. *See Watts v. Florida Intern. University*, 495 F.3d 1289, 1295-1296 (11th Cir. 2007).[19]

Not only is every circuit in agreement concerning the scope of *Bell Atlantic*, but every circuit to consider the question has concluded that *Bell Atlantic* did nothing to undermine the holding of *Swierkiewicz* and its predecessors that a heightened pleading standard cannot be imposed absent changes in the Federal Rules or amendment of statutes upon which particular claims are based. *Phillips*, 499 F.3d at 233 ("The Court emphasized throughout its opinion that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement."); *Burnette v. Bureau of Prisons*, No. 06-30540, 2007 WL 4328808, *1 (5th Cir. 2007) (per curiam) (unpub. op.) (in a *Bivens* lawsuit, citing *Twombly* for "plausibility" standard but not interpreting it as a heightened pleading standard); *United States ex rel. Bledsoe*, 501 F.3d at 502 (not requiring detailed facts under *Bell Atlantic*); *Lindsay*, 498 F.3d at 439-440 &n.6 (noting that, because the majority in *Bell Atlantic* expressed no desire to overturn *Swierkiewicz*, it was still good law, especially in light of *Erickson*);[20] *Limestone Development Corp. v. Village*

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[19] In *Watts*, the court held that *Bell Atlantic*'s plausibility standard applied to a Section 1983 claim based on religious discrimination, 495 F.3d at 1295-96, but also held that an allegation that an adverse employment action constituted a "substantial burden on the exercise of [plaintiff's] religious beliefs" was a factual allegation to be taken as true and one of the facts sufficient to render plausible plaintiff's claim that he was terminated for his sincerely held religious belief. Petitioner would no doubt consider an allegation that particular conduct constituted a "substantial burden" to be a "conclusory" allegation, because it is in essence a legal conclusion. Pet. 23 (arguing that complaint only adverts to "legal standards").

[20] The Sixth Circuit's analysis suggests that *Bell Atlantic* has changed little regarding its pleading standard, because even before *Bell Atlantic* courts in the Sixth Circuit did not need to "accept the plaintiff's legal conclusions or unwarranted factual inferences as true." *Commercial Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007). Nonetheless, in the discrimination context, the Sixth Circuit maintains the consensus rule that discriminatory animus, consistent with Fed.

of Lemont, Ill., -- F.3d --, 2008 WL 852586, *4-5 (7th Cir. 2008) (describing *Bell Atlantic* as rejecting the "old formula-that the complaint must not be dismissed unless it is beyond doubt without merit", but declining to "overread" *Bell Atlantic* in light of *Erickson*);[21] *Mendiondo v. Centinela Hosp. Medical Center*, -- F.3d --, 2008 WL 852186, *4 (9th Cir. 2008) (holding that a complaint "need not contain detailed factual allegations"); *Skaff v. Meridien North America Beverly Hills, LLC*, 506 F.3d 832, 841-42 (9th Cir. 2007) (interpreting *Bell Atlantic* and *Swierkiewicz* as consistent with the Supreme Court's "repeated[] instruct[ion] . . . not to impose . . . heightened pleading standards in the absence of an explicit requirement in a statute or federal rule"); *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007) (in Section 1983 case, describing lesson of *Erickson*, *Bell Atlantic*, and *Swierkiewicz* as ensuring the defendant have "sufficient notice to begin preparing its defense and the court sufficient clarity to adjudicate the merits"); *Robbins*, 2008 WL 747132 at *3-4 (rejecting heightened pleading standard in Section 1983 claims that implicate qualified immunity).

Thus, despite *Bell Atlantic*'s brief provenance, the circuit courts appear to be near consensus regarding its scope and meaning. While some circuit courts have adverted to uncertainty regarding the decision's scope, *e.g.*, *Commercial Money Center,* 508 F.3d at 337 n.4, *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 n.7 (4th Cir. 2007), in those cases the court has found it unnecessary to definitively resolve the issue.[22] It is premature to predict that differences over the meaning and scope of *Bell* Atlantic will emerge after such a

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R. Civ. P. 9, can be alleged generally. *Lindsay*, 498 F.3d at 440.

[21] The Seventh Circuit had initially expressed doubt that *Bell Atlantic* changed the pleading standard, contrasting its view with the view of the *Iqbal* court, *Equal Employment Opportunity Commission v. Concentra Health Servs., Inc.*, 496 F.3d 773, 782 n.4 (7th Cir. 2007).

[22] And the Fourth Circuit, at least, has subsequently expanded *Bell Atlantic*'s reach beyond the antitrust context. *Giarratano*, 2008 WL 771503 at *3-5.

brief time frame. This Court itself has shown no difficulty in resolving such questions, as exemplified by *Erickson*. If anything, the Court's decision in *Erickson* suggests the need to await further percolation amongst the lower courts before concluding that there is any confusion about the pleading standard enunciated in *Bell Atlantic*.

In short, petitioner has failed to identify any meaningful split of authority regarding the question he presents to this Court, has failed to show any dispute amongst the circuit courts as to the meaning of *Bell Atlantic*, and has failed to show that the heightened pleading standard he requests is consistent with this Court's prior decisions regarding either Rule 8's requirements or the principles of qualified immunity. Under these circumstances, certiorari should be denied.

II. THE PETITION ASKS THIS COURT TO ENGAGE IN FACT-BOUND ERROR-CORRECTION

In the absence of support for a heightened pleading standard, petitioner can only argue that the Second Circuit erred in applying *Bell Atlantic* to the complaint in this case. Pet. 26 (stating that it was "error" for Second Circuit to find plaintiff's complaint satisfied Rule 8 and that Court should grant certiorari "to correct this error"). This Court, however, does not typically engage in error-correction, especially the fact-intensive interlocutory error-correction that petitioner requests here.

Petitioner focuses his argument that respondent's allegations are insufficient solely on respondent's excessive force and conspiracy claims. Pet. 21-26. Petitioner fails to make any argument that the Second Circuit erred in reviewing respondent's claims under the Equal Protection Clause and the First, Fourth, and Sixth Amendments. Thus, not only has petitioner made an argument based on error correction, but he has not even attempted to make his argument reach all of the claims that remain. This alone counsels against granting the petition.

Most importantly, though, petitioner never clarifies what he means by "conclusory" allegations. At times he appears to argue that bare allegations of knowledge are "conclusory," Pet. 23, but Rule 9 counsels otherwise. Fed. R. Civ. P. 9(b) (knowledge "may be alleged generally"). Similarly, the Rules specifically provide that allegations as to discriminatory intent are to be alleged generally and not with any specificity. *Id.* The Rules also specifically permit plaintiffs to allege alternative hypothetical claims for relief, permitting allegations regarding knowledge and intent to be alleged against multiple defendants, Fed. R. Civ. P. 8(d), especially here, where the lower courts have specifically found that the defendants have pointed fingers at each other in disclaiming responsibility for the treatment received by respondent. App. 112a. At this stage of the proceeding, with the profound informational asymmetry present in a case like this, petitioner's proposal would require respondent to have access to substantial pre-filing discovery to file a sufficiently pleaded complaint.

In any event, whatever one's definition of "conclusory," respondent's complaint gives "fair notice" of the grounds for his claims against petitioner. Petitioner simply mischaracterizes plaintiff's complaint when he argues that the complaint contains "nothing but vague and factually unsupported allusions to legal standards." Pet. 23. The complaint makes numerous detailed allegations regarding the conditions imposed on the ADMAX SHU, alleges that petitioner was aware of and approved of these conditions, and that petitioner never took any steps to remedy the conditions. *Supra* 4-5; App. 6a, 13a, 25a, 27a, 29a-32a, 34a (Compl. ¶¶ 17, 57-58, 124-25, 134, 148-50, 153-54, 158-61, 174-75.) And plaintiff alleges that the petitioner, among others, established and carried out a policy of confining Mr. Iqbal in the ADMAX SHU for no legitimate reason, and solely because of his race, religion, and national origin. App. 20a (Compl. ¶¶ 96-97); *see also* 28 C.F.R. § 541.22 (Warden responsible for placing inmates in confinement in the ADMAX SHU for punitive reasons). As

the Second Circuit found, the complaint establishes the plausibility of respondent's claims regarding petitioner's personal involvement in these matters in particular "without allegations of additional subsidiary facts." App. 188a, 194a, 195a-196a, 202a. In so doing, the Second Circuit relied on more than just the fact that petitioner was the Warden of the facility. The court cited to numerous facts alleged in the complaint, including that petitioner (1) knew of respondent's continued detention in the ADMAX SHU absent procedural protections, App. 187a, (2) requested that certain officials develop procedures for the unit, knew of the conditions present on the unit, approved of the policies applied on the unit, and knew of the custom of beating detainees on the unit, App. 194a, (3) chose the officers on the unit, App. 195a, and (4) that petitioner's responsibility with respect to religious freedom was established by the complaint and relevant federal regulation, App. 202a.[23]

One wonders what particular facts petitioner believes must be alleged in order to survive a motion to dismiss. Here, respondent has alleged the animus, knowledge, and intent sufficient to establish that petitioner's conduct was unconstitutional, allegations which Rule 9(b) allows to be averred generally. Petitioner's principal complaint appears to be that respondent did not allege with specificity when and how he became aware of his subordinates' unconstitutional beatings of respondent, and when and where he agreed to deprive respondent of his constitutional rights. Pet. 24-26. This is not a complaint that amounts to a Rule 8 problem,

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[23] Petitioner had claimed that the regulations establish the chaplain's responsibility for religious activities in the facility, but as respondent pointed out, in fact the relevant regulations vest relevant discretion in the Warden. 28 C.F.R. § 548.10(b) (warden has authority to "limit attendance at or discontinue a religious activity"); *id.* § 548.15 (warden determines whether attendance at religious activity is open to all prisoners); *id.* § 548.16 (Warden determines what religious property may be used or possessed by prisoners). These regulations make more than "plausible" plaintiff's allegations of petitioner's involvement in the restrictions on religious freedom in the ADMAX SHU.

however. Petitioner has not shown that he cannot answer the complaint as it is written; either he was or was not aware that his subordinates beat ADMAX SHU detainees, subjected respondent to strip and body cavity searches, and so on, or he was not. Similarly, if petitioner claims that he did not agree with anyone to violate respondent's constitutional rights, he can deny those allegations.

Petitioner's related complaint that some of respondent's factual allegations regarding supervisory liability reflect the legal standard for establishing that claim is of no moment. Pet. 23. Petitioner is on no less notice than the hypothetical negligence defendant who has to respond to the allegation that he "negligently" injured another person, or the hypothetical Title VII defendant who has to respond to the allegation that he fired someone "on account" of protected status. *Swierkiewicz*, 534 U.S. at 513-514 & n.4. In both of those examples, the factual allegation deemed sufficient by the Court mirrored the legal standard for liability. And here, respondent has alleged more facts than just the bare legal standard, and un like *Bell Atlantic*, petitioner cannot argue that the facts alleged in respondent's complaint are consistent in any way with otherwise lawful conduct. In this circumstance, the complaint easily exceeds the threshold of plausibility. This is especially the case given the civil rights context in which this complaint was filed, in which the informational asymmetry is profound. This informational disadvantage is manifest in this case, where the defendants on appeal – as in the district court – sounded an inharmonious chorus of disavowal, each seeking to lay on another the responsibility for the treatment of Mr. Iqbal over the year following September 11, 2001. Petitioner, for instance, argued alternatively that his subordinates were entirely responsible for plaintiff's confinement in the ADMAX SHU (Hasty Appellate Br. 42 (referring to role of Segregation Review Officials)), or that his superiors bear responsibility (*id.* 43-44 (referring to role of his co-defendants on appeal).)

In the courts below, petitioner had no difficulty identifying the legal claims and factual bases for those claims in arguing that he was entitled to qualified immunity. For he argued both that the law governing respondent's claims was not "clearly established," and that his behavior, as alleged in the complaint, was reasonable under the circumstances. Petitioner does not explain how the complaint could both give insufficient notice of the factual basis for respondent's claims, while providing enough factual detail for petitioner to argue that he behaved reasonably under the circumstances. As both the Second Circuit and district court found, the complaint provides ample factual support for petitioner to prepare a defense and to understand the basis for respondent's claims. Nothing more is required.

III. Even If The Question Presented Were Certworthy, This Case, In Its Current Posture, Is A Bad Vehicle

Even were the Court inclined to grant certiorari on the question presented, this case is a poor vehicle for addressing the issue. First, there is a substantial question as to whether there is even jurisdiction to consider the question presented. Interlocutory appeals, although disfavored, are permitted in limited circumstances for appeals of the denial of a motion to dismiss or for summary judgment asserting the defense of qualified immunity, as an iteration of the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Not every denial of qualified immunity is subject to interlocutory appeal, however. *Johnson v. Jones*, 515 U.S. 304, 314 (1995). The exception for interlocutory appeals of qualified immunity decisions permits appellate courts to decide abstract issues of law, "typically, the issue whether the federal right allegedly infringed was 'clearly established.'" *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). When bringing such an appeal, however, the defendant must accept the

plaintiff's version of the facts as presented in the district court, for in those circumstances, the appellate court can review the district court's determination of the "purely legal issue what law was 'clearly established,'" and need not consider the correctness of the plaintiff's version of the facts. *Johnson*, 515 U.S. at 313. Here, petitioner petitioner is not arguing that the law was not "clearly established," but has instead refused to accept the facts alleged in plaintiff's complaint as true for the purposes of his appeal. Moreover, because the right to an interlocutory appeal is limited to the legal issue of qualified immunity, there is no jurisdiction to review petitioner's claims that respondent has failed to allege a cause of action under 42 U.S.C. § 1985(3). *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995) (supplemental interlocutory jurisdiction disfavored).

Relatedly, because of the interlocutory nature of this appeal, granting certiorari would be premature. Consistent with this Court's admonition in *Crawford-El*, the Second Circuit remanded to the district court to permit limited discovery regarding the qualified immunity defense raised by petitioner, among others. App. 172a-173a. The purpose of so doing was to protect petitioner and his co-defendants from the "broad-reaching" discovery with which *Harlow* was concerned. *Crawford*-El, 523 U.S. at 593 n.14 (noting that an assertion of qualified immunity did not foreclose all discovery). Therefore, contrary to petitioner's suggestion, he has yet to be confronted with answering discovery that undermines the interests behind the qualified immunity defense. *Id.* (suggesting that permitting discovery necessary to decide a motion for summary judgment based on qualified immunity would not undermine the purpose of the immunity). Indeed, the court of appeals envisioned a reasonable progression of discovery, from limited written discovery on targeted inquiries as to the qualified immunity issues before even depositions were permitted of defendants like the petitioner.

Finally, perhaps most importantly, even if the Court grants certiorari here and ultimately disagrees with the Sec-

ond Circuit's assessment of the complaint, respondent will have no difficulty amending his complaint to allege facts that meet a "heightened" standard. Since the complaint was filed, respondent has obtained discovery from the United States and other defendants that confirms the principal role that petitioner played in the unconstitutional conditions of confinement experienced by respondent. If this Court finds that *Bell Atlantic* enunciates a new pleading standard that was not satisfied by the complaint in the instant case, such amendment will be both proper and sufficient to meet whatever standard of pleading is expected of a plaintiff at this prediscovery stage.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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